Beh Chun Chuan v Paloh Medical Centre Sdn Bhd & Ors

HIGH COURT (IPOH) — WINDING-UP NO 28–1 OF 1998
KANG HWEE GEE J
17 JUNE 1999

Companies and Corporations — *Winding up — Petition under s 181 — Oppression — Breach of terms of shareholders' agreement — Terms not incorporated into articles of association — Whether necessary to incorporate terms into articles of association in order to bind shareholders inter se*

The petitioner was a minority shareholder of a company. A shareholders' agreement was executed whereby it was provided that the parties shall procure that the memorandum and articles of association of the company be amended so that the provision in the memorandum and articles of association shall comply with the terms of the shareholders' agreement. However, until the date of the petition, no steps were taken by any of the parties to procure the amendment. The petitioner alleged that the affairs of the company were conducted in a manner oppressive to the petitioner. The petitioner's complaints of oppression appeared to have been anchored on the alleged breach of the terms of the shareholders' agreement which had not been incorporated into the articles of association of the company.

Held, dismissing the petition:

In order to ensure that the terms of the shareholders' agreement shall bind the shareholders inter se under the Companies Act 1965, it would be necessary to incorporate them into the articles of association of the company. In the instant case, however, the terms in the shareholders did not initiate any proposition to amend the articles to incorporate the terms in the shareholders' agreement into the articles (see p 267B–C). The submission that the shareholders' agreement governed the conduct of the company and prevailed over its articles of association was untenable. In the event, it follows that all the complaints put forth by the petitioner which were anchored on the breach of the agreement must fail. But even assuming that the shareholders' agreement could be the basis of oppression in place of the articles of the company, the court did not find any of the complaints oppressive that would require a relief under s 181 of the Companies Act 1965 (see p 269F–H).

[Bahasa Malaysia summary

Pempetisyen adalah pemegang saham minoriti sebuah syarikat. Suatu perjanjian pemegang-pemegang saham telah dimasuki di mana adalah diperuntukkan bahawa pihak-pihak akan mendapatkan pindaan pada memorandum dan perkara-perkara persatuan agar peruntukan di dalam memorandum dan perkara-perkara persatuan akan mematuhi

terma-terma di dalam perjanjian pemegang saham. Namun, sehingga tarikh petisyen, tiada langkah diambil oleh pihak-pihak untuk membuat pindaan. Pempetisyen mengatakan bahawa hal-hal syarikat telah dijalankan dengan cara yang menindas terhadap pempetisyen. Aduan pempetisyen mengenai penindasan adalah seolah-olah berdasarkan pemecahan terma perjanjian pemegang-pemegang saham yang belum dimasukkan di dalam perkara-perkara persatuan.

Diputuskan, menolak petisyen:

Untuk memastikan bahawa terma-terma perjanjian pemegang saham mengikat pemegang saham inter se di bawah Akta Syarikat 1965, adalah perlu untuk memasukkannya di dalam perkara-perkara persatuan syarikat tersebut. Namun, di dalam kes ini, terma-terma perjanjian pemegang saham tidak memulakan sebarang saranan untuk meminda perkara-perkara persatuan untuk memasukkan terma-terma perjanjian pemegang saham ke dalam perkara-perkara persatuan (lihat ms 267B–C). Hujahan bahawa perjanjian pemegang saham mengawal urusan syarikat dan adalah terdahulu daripada perkara-perkara persatuan tidak boleh dipertahankan. Oleh itu segala aduan yang diutarakan oleh pempetisyen yang berdasarkan pemecahan perjanjian tersebut mestilah gagal. Namun walaupun diandaikan bahawa perjanjian pemegang saham boleh menjadi dasar untuk penindasan menggantikan perkara-perkara persatuan syarikat, mahkamah tidak mendapati sebarang aduan-aduan sebagai menindas dan memerlukan relif di bawah s 181 Akta Syarkat 1965 (lihat ms 269F–H).]

Notes

For cases on winding up generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 618–918.

Cases referred to

A & BC Chewing Gum Ltd, Re; Topps Chewing Gum Inc v Coakley & Ors [1975] 1 All ER 1017 (refd)

Ebrahimi v Westbourne Galleries Ltd & Ors [1972] 2 All ER 492 (refd)

Jermyn Street Turkish Baths Ltd [1971] 3 All ER 184 (refd)

Kong Thai Sawmill (Miri) Sdn Bhd, Re; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung [1978] 2 MLJ 227 (refd)

Lim Cheng Huat Raymond v Teoh Siang Teik [1996] 3 SLR 605 (refd)

Russell v Northern Bank Development Corp Ltd & Ors [1992] 3 All ER 161 (refd)

Teo Choon Mong Frank v Wilh Schulz Gmbh & Anor [1998] 2 SLR 529 (refd)

Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd & other appeals [1996] 1 MLJ 661 (refd)

Welton v Saffery [1895–99] All ER Rep 567 (refd)

Wondoflex Textiles Pty Ltd, Re [1951] VLR 458 (refd)

Legislation referred to

Companies Act 1965 ss 18(1)(a), 131(1), 181(2)(c), (d), 369

KL Chan & Lee Yen Lyn (*Chan & Associates*) for the petitioner.
Selvanathan (*Kean Chye & Sivalingam*) for the first respondent.
T Sunther (*A Zahari Kanapathy Thulasi*) for the second and third respondents.
V Vijaya (*Maxwell Kenion Cowdy & Jones*) for the fourth respondent.

Kang Hwee Gee J:

The Background

The first respondent, Paloh Medical Centre Sdn Bhd ('the company') is a private limited company incorporated on 29 March 1991 under the Companies Act 1965.

The main object of the company was to establish and run hospitals and provide medical services, and to carry on the business of providing medical supplies.

The petitioner Beh Chun Chuan, IGB Corp Bhd and Yayasan Perak (the fourth respondent) were its shareholders and together with the petitioner were its founder shareholders.

For the purpose of building the hospital and medical mall the State Government of Perak had agreed to alienate to the company a piece of land.

Later the founder shareholders approached the second respondent, Hospital Pantai Bhd, a company with substantial experience in operating a private hospital, to join the company so that its expertise could be utilized in setting up the medical centre.

The issued and paid up capital of the company at this point of time was RM4m of RM1 each, which was held as follows:

(i) IGB Corporation Bhd — 1,500,000 shares
(ii) Yayasan Perak — 896,000 shares
(iii) Beh Chun Chuan (petitioner) — 1,604,000 shares

Upon Hospital Pantai Bhd joining the company, it became necessary to define the rights and obligations of the parties in a shareholders' agreement and the same was entered into between the founder shareholders on one part and Hospital Pantai Bhd on the other, on 11 October 1991.

The issued and paid up capital of the company was increased to RM6m and the share ownership structure after the shareholders' agreement was revised as follows:

(i) IGB Corp Bhd — 1,500,000 shares
(ii) Yayasan Perak — 900,000 shares
(iii) Beh Chun Chuan (petitioner) — 1,500,000 shares
(iv) Hospital Pantai Bhd — 2,100,000 shares

Subsequently, IGB Corp disposed off all its shares to the petitioner and the second respondent. The disposal resulted in the further change in the issued share capital structure of the company. Eventually at the time of this petition, the petitioner came to hold only a minority shareholding of 30.36%; the second respondent (Pantai Hospital Bhd) the majority of 49.58% and the fourth respondent (Yayasan Perak) 15%, with their corresponding voting rights.

The Board of Directors of the company was appointed in accordance with the terms of the shareholders' agreement which allowed the respective shareholders to appoint himself and nominate others who were not shareholders to sit on the Board. The third respondent Mohd Sultan bin Haji Sickander was a nominee director of the second respondent.

The land the company applied for was alienated to the company sometime at the end of 1992 and eventually, the hospital and medical mall was built on the land. It began operation sometime on 28 October 1995. By 1995 however, the relationship of the petitioner with the other Board members particularly with the Managing Director, the third respondent deteriorated over some disagreements on the management of the hospital.

On 29 December 1997, at an Extraordinary General Meeting requisitioned by the second respondent, the petitioner and his nominee director one Beh Choon Lian (nominated under the shareholders' agreement), were removed from the Board on the ground that they had contravened art 72(h) of the Articles of the company in failing to declare their interests in two other companies which had entered into tenancy agreements with the company.

Two salient provisions of the shareholders' agreement may be noted:

Clause 22.1 provides that the agreement shall continue in force for a period of five years from the date it was signed unless it was extended by mutual consent.

Clause 14.1 provides that, upon the effective date, the parties shall procure that the memorandum and articles of the company be amended so that the provisions in the memorandum and articles of association shall comply with the terms of this agreement. The effective date was defined in the agreement as the date when the land on which the hospital now stood was alienated by the State Government.

However, until the date of this petition, no steps were taken by any of the parties to procure the amendment to the articles of the company to comply with the terms of the shareholders' agreement as envisaged in cl 14.1.

The case for the petitioner

The complaints against the respondent company are framed to include the two aspects of s 18(1)(a) of the Companies Act 1965:

(i) that the affairs of the company are conducted in a manner oppressive to the petitioner or in disregard of the petitioner's interest in the company;

(ii) that the powers of the directors are being exercised in a manner oppressive to the petitioner or in disregard of the petitioner's interest as a member of the company.

In this petition (as amended) the petitioner seeks the following orders:

(a) An order that the necessary accounts and enquiries be held;

(b) An order that any resolution to remove the petitioner and/or his appointed directors be prohibited or if passed, be cancelled;

(c) An order that the second and/or third respondents be liable for all loss and damages arising from the appointment of Dr Namazie which is irregular as being contrary to the shareholders' agreement;

(d) An order that the conduct of the affairs of the company be regulated by amending the articles of association to comply with the terms and conditions of the shareholders agreement';

(e) In the alternative, an order that the company be wound up;

(f) All necessary and consequential directions;

(g) The cost of and incidental to this application be borne by the respondents.

Initially, the fourth respondent (Yayasan Perak), was not a party in this petition. It was made a party by the consent of the petitioner and the other respondents on 20 March 1998.

The preliminary issue

In the main, the petitioner's complaints of oppression appear to have been anchored on the alleged breach of the terms of the shareholders' agreement, which unfortunately had not been incorporated into the articles of association of the company. Before considering the substance of the petition it would be appropriate that I first consider the question whether the petitioner can ignore the article and rely on the breach of such an agreement as the basis of a complaint of oppression under s 181(1)(a) of the Companies Act 1965.

Whether the petitioner can ignore the article of association and rely on the shareholders' agreement to find oppression:

A shareholders' agreement is essentially a contract between the members of the company to regulate their conduct and define their duties and obligations inter se in the running of the company. (See *Graham Stedman and Janet Jones — Shareholders' Agreement* (2nd Ed, Longman) at 1.42).

However, a shareholders' agreement only creates personal obligations. This principle had been established in the judgement of Lord Davey in *Welton v Saffery* [1895–99] All ER Rep 567 at p 585 and applied more recently in the House of Lord case of *Russell v Northern Bank Development Corp Ltd & Ors* [1992] 3 All ER 161 at 166 per Lord Jauncey, the relevant passage of which was as follows:

> Of course, individual shareholders may deal with their own interests by contract in such a way as they may think fit. But such contracts, whether made by all or some only of the shareholders, would create personal obligations, or an exceptio personalis against themselves only, and would not become a regulation of the company, or be binding on the transferees of the parties to it, or upon new or non-assenting shareholders.

It follows that in order to ensure that the terms of the shareholders' agreement shall bind the shareholders inter se under the Companies Act 1965, it would be necessary to incorporate them into the articles of the company. In the instant case, however, the shareholders did not initiate any proposition to amend the articles to incorporate the terms in the shareholders' agreement into the articles pursuant to cl 14.1.

There appears to be no case law directly on point in our jurisdiction whether a breach of the terms in a shareholders' agreement can be used as a basis of a complaint of oppression under s 181 of the Companies Act 1965, where the exercise of the act by the directors, or where the affairs of the company are conducted in violation of the agreement but nevertheless within the governance of the articles of association.

However, the Singapore Court of Appeal had ruled in *Lim Cheng Huat Raymond v Teoh Siang Teik* [1996] 3 SLR 605 at p 621 inter alia that an allegation of oppression under s 216 of the Companies Act (Cap 50, 1994 Ed) the equivalent of s 181 of our Companies Act 1965, cannot be founded on a loan agreement contracted between the petitioner and the respondent in that case wherein the respondent had agreed to transfer some shares to the petitioner, but had later allegedly reneged on his promise. It was held that the refusal to transfer the shares to the petitioner had nothing to do with the conduct of the affairs of the company or an act carried out by him in exercise of his powers as a director of the company. The petitioner, it was held, was at liberty to vindicate his claim on the agreement by taking out a separate action.

Here in our own jurisdiction, in *Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd & other appeals* [1996] 1 MLJ 661, the Court of Appeal had to decide whether the claim of a legitimate expectation by Leong Hup to have a permanent seat on the Board of Directors of a company called Kentucky Fried Chicken Holdings (M) Bhd (KFCM) could be made the basis of a petition for relief under s 181 of the Act. The legitimate expectation arose from an alleged representation and oral agreements made with the other directors, which were not incorporated into the articles of association of the company. Mahadev Shanker JCA, speaking for the court said at p 692:

> So far as legitimate expectation is concerned, I need not go into the other cases cited, except to say that *Re Tottenham Hotspur plc* [1994] 1 BCLC 695 is yet another instance where the court declined to take cognizance of an alleged private arrangement between two shareholders as to control of a public company. From any point of view, KFCM cannot be regarded as a quasi-partnership between just Leong Hup and Ishak and George Ting or the interest they are alleged to have represented in March 1993. It may be that at that time these people were prepared to leave matters relating to their share

> ratios and increases of capital in KFCM fluid thus indicating mutual trust and confidence but if they regarded these matters as important, we think it was imperative not only that the agreements on such matters should have been put into writing but also the articles of association should have been amended so as to substantiate the claim that is now being made.

The *Leong Hup* case did not go so far as to rule that a petition under s 181 could or could not be based on a shareholders' agreement per se. But it seems clear to me that it had at least set the mood and pace if not the law, that any petition for relief under s 181 based on a complaint outside the articles of association is unlikely to succeed.

There is strong rationale in support of this proposition. Much like a club is governed by its constitution, a company is governed by its memorandum and articles of association. A company's memorandum and articles are therefore the cananic yardstick upon which the legality of its act and those of its officers must be tested and any acts of the company or of its officers which are opposed to its memorandum or articles are likely to be struck down by the court as ultra vires. To rely on extrinsic document to determine the legality of the act of the company or of its directors would be to invite uncertainty in corporate governance.

But that is not to say that a breach of a shareholders' agreement can never be made the subject of oppression. It can — provided that the act complained of under the agreement falls outside the governance of the articles and cannot be justified under it. 'Oppression' in the context of s 181(1)(a) is after all an inexact equitable concept. In the words of Buckley LJ in *Re Jermyn Street Turkish Baths Ltd* [1971] 3 All ER 184 at p 199c :

> ... oppression occurs when shareholders, having a dominant power in a company, either: (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs; or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs and when such conduct is unfair or ,to use the expression adopted by Viscount Simonds in *Scottish Co-operative Wholesale Society Ltd v Meyer* [1958] 3 All ER 66 at p 71: ' burdensome, harsh and wrongful' to the other members of the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs: see *Scottish Co-operative Wholesale Society Ltd v Meyer* and *Re HR Hammer Ltd* [1958] 3 All ER 689. We do not say that this is necessarily a comprehensive definition of the meaning of the words 'oppressive' in s 210, for the affairs of life are so diverse that it is dangerous to attempt a universal definition. We think, however, that it may serve as a sufficient definition for our present purpose. Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor. If a director of a company were to draw a renumeration to which he was not legally entitled to or in excess of the renumeration to which he was legally entitled, this might no doubt found a misfeasance proceedings or proceedings for some other kind of relief, but it would not, in our judgment, of itself amount to oppression. Nor would the fact that the director was a majority shareholder in the company make any difference, unless he had used his majority voting

A powers or retain the renumeration or to stifle proceedings by the company or other shareholders in relation to it.

Thus in *Re A & BC Chewing Gum Ltd; Topps Chewing Gum Inc v Coakley & Ors* [1975] 1 All ER 1017, the repudiation by certain shareholders of another shareholder's right to appoint a director in contravention of the B shareholders' agreement, was held by Plowman J of the Chancery Division to constitute an oppression and therefore rendered it just and equitable that the company be wound up under s 222(f) of the Companies Act 1948 of the United Kingdom. The repudiation had contravened not only the shareholders' agreement but also the articles of the company which had been amended earlier to reflect the terms agreed to by the shareholders in C the shareholders' agreement.

Nearer home, the *Chewing Gum* case was applied by the Singapore Court of Appeal in *Teo Choon Mong Frank v Wilh Schulz Gmbh & Anor* [1998] 2 SLR 529 in an application for a restraining order against the oppressive conduct of shareholders in a company. In that case the court had D to decide whether the acts of the respondents in removing the appellant as a director of a company contrary to the term of a shareholders' agreement which had also violated the relevant articles of association, constituted a repudiation of the agreement. The question was answered in the positive; an injunction lie to restrain the respondent's action until the trial. A fortiorari, an oppression under s 181 of the Companies Act 1965.

E In both these cases it will be noted that the shareholders' agreement was incorporated into the articles of the companies, unlike in the instant case. The respective oppression complained of was in fact tested against the articles of association and not merely against the terms of the shareholders' agreement. It would not make any legal sense if the legality of the conduct F of the director or the company are tested against any extrinsic documents, the effect of which would render absurd the established principle that the company's governing constitution is always its memorandum and articles of association.

I am therefore bound to find the submission that the shareholders' agreement governed the conduct of the first respondent company and G prevailed over its articles of association untenable. In the event, it follows that all the complaints put forth by the petitioner and described below which are anchored on the breach of this agreement must fail.

But even assuming that the shareholders' agreement could be made the basis of oppression in place of the articles of the Company, I do not find any H of the complaints oppressive that would require a relief under s 181 of the Companies Act 1965.

Failure to renew the shareholders' agreement

Clause 22.1 of the shareholders' agreement provides that the agreement was I to remain valid for five years, unless it is extended by mutual consent of the parties. Before the expiry of the agreement on 11 October 1996 the petitioner had vide letters dated 8 August 1996, 2 September 1996 and

4 September 1996 addressed to the secretary of the company and by a letter dated 5 September 1996 addressed to the two shareholders of the company requested that the agreement be extended. To date the second and third respondents had failed to comply with his request. A

The petitioner claimed that their refusal to renew the shareholders agreement was in breach of cl 22.1 and therefore constitutes an oppression on him as a member of the company. It was submitted by counsel for the petitioner that at the very least the other parties should deliberate on the question whether or not the shareholders' agreement would be extended by putting it on the agenda of the meeting of the board of directors which the secretary of the company failed to do. The omission, counsel submitted, reflects on the unwillingness of the other parties to abide by a crucial term of the shareholders' agreement and shows a lack of good faith on their part. B C

Assuming that such an agreement could form the basis of a complaint of oppression under s 181(1)(a) of the Companies Act 1965, a close reading of cl 22.1 suggests that it did not bind the parties to extend the agreement at the expiration of the five years at all costs. It merely provides that the parties may by mutual consent extend it. The clause puts an automatic end to the agreement in five years although it also envisaged that each of the parties would be free to exercise his option whether to renew — without conferring on any of them including the petitoner the right to a renewal, such that even if the petioner had wanted an extension, the others were at liberty to refuse. It therefore follows that in failing to respond to the petitioner's call to renew the agreement they had not impinged on the right or benefit of the petitioner. To ground their failure or refusal to renew the agreement as the basis of oppression, it is axiomatic that the petitioner must first be able to show that he had a right to insist on the renewal of the agreement and not merely a faint expectation. I fail to see therefore how the failure of the other parties to respond to his overture to renew the agreement could constitute in the circumstances of this petition an oppression on the petitioner. D E F

Employment of the anaesthesiologist Dr Mohd Namazie Ibrahim

Dr Namazie, a consultant anaesthesiologist, was appointed to the hospital on 12 March 1996 by the third respondent, Mohamed Sultan bin Hj Sickander, the managing director of the company. G

The petitioner contended:

(i) that the appointment was made contrary to the decision of the board on the 17th board meeting held on 21 December 1995 wherein the board had authorised the Executive Committee comprising three directors, one from each shareholder to decide on the provision of anaesthetist services to the hospital (vide the minutes Agreed Bundle 133-137). En Mohd Sultan, it was contended, was in breach of his duty when he went ahead on his own to appoint the anaethesiologist without the instructions of the Board and the Executive Committee's instruction. H I

(ii) that the appointment was made in contravention of cl 9.2 read with cl 9.2(m) of the shareholders' agreement which stipulates that:

> the company entering into any agreement to employ any person with total emoluments of more than RM100,000 only per annum or for any person to provide services on a consultancy basis at a cost of more than RM100,000 only ... shall require the affirmative decision of a majority of the directors present at the meeting which shall include the affirmative vote of at least one director nominated by three of the parties hereto.

(iii) that the employment of Dr Namazie was not in the best interest of the company as Dr Namazie's term of employment did not provide for income sharing with the company. It was alleged that the company had in fact received suitable offers from five other groups all of which had offered to share their income with the company.

A perusal of the minutes of the 17th Board Meeting of 21 December 1995 discloses that with regard to the appointment of the anaesthesiologist, the board had resolved that:

> the Executive Committee (comprising of the three directors, one from each shareholder) be empowered to decide on such services. (see Bundle of Minutes 133 at 136).

Following the above decision the Executive Committee sat on 8 February 1996 and it was resolved:

> that Encik Mohamed Sultan proceed to conclude the appointment of the consultant since discussions had already been entered into between the various consultants and himself. (see Bundle of Minutes 140 at 145).

I fail to see how the appointment of Dr Namazie could conceivably be raised as a ground of this petition when the fact clearly did not justify the petitioner's allegation. It is clear that the act of En Mohamed Sultan to appoint Dr Namazie was sanctioned by the Board and the Executive Committee. The minutes show that the petitioner himself was present at the 17th board meeting and his own representative En Rane Lim had represented the petitioner. Neither of them had registered any objections at the meetings.

Having been sanctioned by the Board and the Executive Committee, I fail to see how the petitioner could now complain that the appointment of the anaesthesiologist was not in the best interest of the company. It was a decision which had been sanctioned by the Board to which the petitioner himself was privy to. The fact that the other anaesthesiologists had made offers to the company had also been noted and taken into consideration by the Executive Committee when they deliberated on the meeting of 8 February 1996 and resolved to authorise En Mohamed Sultan to decide on the appointment of an anaesthesiologist.

Renovation of fourth floor of the Hospital

Sometime in June 1996 renovation works were carried out to the fourth floor of the hospital.

The petitioner contended that the second and third respondents had engaged contractors to carry out the renovation at a total cost of RM357,968.10 without the approval of the board and was in breach of cl 9.2(j) or shareholders' agreement which read as follows:

> Subject to cl 13.2 below, decisions on any of the matters set out below shall require the affirmative decision of a majority of the directors present at the meeting which shall include the affirmative vote of at least one (1) director nominated by three (3) of the parties hereto:
>
> (j) any capital expenditure by the company in respect of any one item or series of related items in excess of Malaysian Ringgit (250,000).

Having decided on the renovation, the second respondent attempted to ratify the said act by circulating a Directors' Circular Resolution dated 22 November 1996. The petitioner claimed that he had refused to ratify the act but nevertheless decided to approve the payment of the sum of RM104,142.51 to save the company from the embarrassment after it was sued by the contractor.

The petitioner alleged that the act of the second and third respondents was prejudicial to his interest and therefore constitutes an oppression.

The respondents did not dispute that the renovation was carried out during the pendency of the shareholders' agreement and that the decision to do so had contravened cl 9.2(j) but sought to justify their action by maintaining that the renovation was necessary to convert the fourth floor into an administrative block. It was contended that the fourth floor was meant to be an administrative office all along in the building plan which the petitioner had himself approved earlier. Following the decision to renovate, the petitioner had even approved the initial down payment of 30% to the contractor on 3 July 1996. In any case it was argued by counsel for the 1st respondent, could hardly be interpreted an oppressive conduct as it was in the better interest of the company.

To dispose of this complaint it would only be necessary to refer to the payment voucher 'exh MAZ-11' referred to in the affidavit in reply of the first respondent as evidence of the down payment. It was dated 3 July 1996 and made payable to: 'GV Enterprise being 30% down payment for the fourth floor renovation work, contract sum RM258,544.70; 30% down payment RM77,563.41'.

The petitioner on being cross-examined admitted that he had signed the voucher but contended that he had done it on the mistaken belief that the payment was for the purchase of furniture. Having made that admission, I could come only to one conclusion; that the petitioner had acquiesced in the decision to award the renovation work to the contractor and had in fact went along with the management of which he was himself a part of, to approve the 30% down payment. It would appear to me that the objections he had with regard to the balance sum due to be paid to the contractor was merely an afterthought. Having approved the down payment himself without reservation he could not now be heard to say that the decision of the first and second respondent had acted oppressively.

Purchase of angiography equipment

The petitioner contended that during the 15th Board Meeting on 28 February 1995 he had opposed a proposal to equip the hospital with the facility due to the hospital's already large capital commitment. He suggested instead that the company let out the space in the hospital for another party to operate the facility. Notwithstanding his objection, the second respondent on 2 February 1996 proceeded to enter into an agreement with a medical supplier called Abex Medical System Sdn Bhd to purchase an angiography system for the hospital at a substantial cost of RM2,250,000. The decision it was alleged was made without the approval of the board or the shareholders and was in contravention of cl 9.2(j) of the shareholders' agreement. The agreement with Abex Medical System was however aborted when the petitioner refused to sign the Executive Members' Circular resolution dated 6 July 1996 to approve the purchase of the system.

The respondents did not dispute the allegation. On the face of it the complaint appears legitimate. But since the agreement had been aborted and the purchase was not carried out, it could no longer be made a ground of oppression. The Privy Council case of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227 at p 229 may be cited as the authority that to constitute oppression in s 181(1)(a) the act complained of must be current in the sense described by Lord Wilberforce:

> Thirdly, in a number of United Kingdom decisions it has been held that for s 210 to apply the complainant must show oppression continuing up to the date of proceedings (eg *Re Jermyn Street Turkish Bath Ltd* [1971] 1 WLR 1042); where there has been oppression in the past, the section does not bite. Their Lordships agree that the wording of the sextion(and the same true is true of s 181(1)(a)) relates to a present state of affairs: 'are being conducted', powers 'are being exercised' are grammatically clear: the language may be contrasted with s 181(a)(b) which refers to an act of the company which has been done or threatened. But this argument must not be taken too far. What is attacked by sub-s (1)(a) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be 'oppressive' or 'in disregard' even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that, as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section. This point is well brought out in *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 at p 1011–1012.

With respect to the instant petition, the decision of the respondents in proceeding to purchase the system despite the petitioner's disapproval, as was suggested in *Re Kong Thai Sawmill* could well show that over a period the tendency or propensity to oppress or to disregard the petitioner's interest still exists at the time of the proceeding. However, I could not find the existence of any such tendency or propensity to oppress or to disregard the petitioner's interest at the time this petition was filed.

Exclusion of the petitioner from being a signatory of the company's cheques A

During the board meeting of 26 November 1997 the Board resolved to alter the requirement of the requisite signatories by authorising any two directors, one from each shareholder, to sign any cheque irrespective of amount. Neither the petitioner nor his appointed director was present at that meeting. The petitioner contended that the alteration in the signatories B of cheques had contravened cl 11 of the shareholders' agreement and had the effect of indirectly excluding the petitioner from the financial control of the company to the prejudice of his interest in the company.

Clause 11 read as follows:

11.1 For the purpose of the signing of cheques in the company's bank C accounts the Parties hereto will be divided into (2) groups as follows:

Group 1 - PHB (Pantai Hospital Bhd)

Group 2 - IGB (Ipoh Garden Bhd)

YP (Yayasan Perak) D

Beh Chun Chuan (Petitioner)

11.2 Each of the parties hereto will nominate their signatories to the bank account.

11.3 Cheques below $50,000 will require two signatories one from Group 1 and one from Group 2. E

11.4 Cheques above $50,000 but below $250,000 will require three signatories, one from Group 1, and two from Group 2, provided that the two signatories in Group 2 will not come from the same shareholder.

11.5 Cheques of RM250,000 and above will be subject to the same provisions as 11.4 above, but will also require Board's approval. F

I would agree with the submission of counsel of the petitioner that the clause was intended to allow the respective party including the petitioner to exercise some control over the finance of the company and that a breach of it would be of so fundamental a nature that may well attract the making of a winding up order on the just and equitable principle. However, it is clear G that when the Board sat to pass this resolution, the shareholders' agreement had expired. I had earlier deliberated on the legality of not having the agreement renewed. As a corollary to my finding that it was not the intention of the parties that the shareholders' agreement must be renewed at all costs, it would be equally legitimate to find that the contracting parties had not intended that the financial control so envisaged in cl 11 should be H in place after the expiry of the shareholders' agreement. It follows that after its expiry they were free to alter the signatory structure of cl 11 unless prevented under the articles.

The expiry of the shareholders' agreement notwithstanding, it would appear that there was a legitimate reason why the signatory structure I needs to be changed, although the minutes of the Board Meeting of 26 November 1997 did not disclose the reason why it was necessary to

A do so. This appears in para 21 of the affidavit of Mohd Annuar bin Zaini (encl 26) the General Manager of the shareholder Yayasan Perak as follows:

> I have, in my capacity of chairman of the first respondent company, received complaints from the staff of the hospital as to the refusal of the petitioner to
B sign cheques being payments to creditors and in some cases, causing delay in the payments to medical consultants and refund of deposits to patients who were being discharged due to his absence from the hospital.

I have no reason to disbelieve what the General Manager said, considering that Yayasan Perak (as was aptly described by its counsel, En Segeran) was
C a neutral party in the dispute who was being made the fourth respondent in this petition only by its own intervener's action. Accepting that his words represent the true state of affairs that existed and persisted until the Board meeting of 26 November, I can only come to the conclusion that was a basis to alter the signatories of the company's cheques and that the complaint was unfounded.

D

Tenancy agreement with Gribbles

By a tenancy agreement dated 1 January 1997 the first respondent had let out one of the suites to a company called Gribbles Pathology (M) Sdn Bhd, a company in which the third respondent had an interest and had
E so declared to the Board. Under cl 7 of the agreement, the tenancy would cease if the rent was in arrears for 14 days. Gribbles, it was alleged was in arrears of rent for five months. Its tenancy should have been terminated earlier. Instead it was allowed to continue resulting in loss to the company. It was contended that the third respondent (as its managing director) despite having legally declared his interest, had
F allowed his interest to conflict with the company's in failing to collect the arrears of rent and to evict Gribbles.

To rule on this complaint, it may be necessary to refer to the oft-cited speech of Lord Wilberforce in *Re Kong Thai Sawmill* with respect to the scope within which the affairs of the company or the powers of the directors
G may be said to have been exercised oppressively or in disregard of the interest of the minority at p 229:

> Secondly, for the case to be brought within s 181(1)(a) at all, the complaint must identify and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which
H the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a
I shareholder is entitled to expect before a case of oppression can be made (*Elder v Elder & Watson Ltd* 1952 SC 49): their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to

take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at the proper company procedure (per Lord Clyde in *Thompson v Drysdalenaught* 1925 SC 311 at p 315).

The fact that Gribbles was in arrears of rent was not disputed by the respondents.

But the mere failure to institute any action against Gribbles, it is clear to me, could not constitute an act of oppression or disregard of the interest of the petitioner. Nor was there a conflict of interest. It was clearly an executive decision as envisaged in *Re Kong Thai Sawmill* which the third respondent was bound to make, for his decision not to act against Gribbles could be amply justified by the fact that at the relevant time, the first respondent had owed Gribbles the sum of RM65,444 being charges for the laboratory services it rendered to the first respondent (see encl 12, exh MAZ-8).

Removal of the petitioner and his nominee as directors

On 29 December 1997, at an EGM the petitioner and his nominee director Beh Choon Lian were removed on the ground that they had failed to declare their interest in one BP Clinical Lab Sdn Bhd and BE-P Pharmacy Sdn Bhd. Both these companies were tenants of the first respondent company (Paloh Medical Centre) vide a tenancy agreement dated 28 October 1995 and had occupied two shops at the hospital. It was not disputed that the petitioner had substantial interest in these two companies and that he had not declared his interest at a meeting of directors as required under art 72(h) of the company.

The petitioner however, claimed that he could not be removed. The removal of any director including himself and his nominee in the company rests with him alone under the relevant clause in the shareholders' agreement providing for the appointment of directors and not under the article of the company. The relevant cl 7 read as follows:

7.1 As from the effective date, the Board of Directors (hereinafter referred to as 'the Board') shall consist of nine (9) members and shall be constituted as follows :

(i) two (2) members nominated by IGB;

(ii) two (2) members (including the Chairman) nominated by YP;

(iii) two (2) members nominated by BCC;

(iv) three (3) members nominated by PHB.

7.2 None of the directors shall be required to hold any qualification shares.

7.3 The powers of the parties to nominate directors shall include the powers:

(i) to appoint alternate directors of their choice to act in the place of the nominated director;

(ii) to fix the period of the appointment;

(iii) to remove a director so appointed or his alternate;

(iv) whenever a director ceases for any reason to be a director, to nominate another director or alternate to act in his place.

A It was submitted by counsel for the petitioner that under cl 7.1(iii) of the agreement the petitioner and the other party to the agreement could nominate two persons as directors and under cl 7.3(iii) the power to nominate a director includes the power to remove the said director or his nominee. In the event he submitted, under the agreement the petitioner could not be removed as a director under the article except by himself. B Although no attempt was made by the parties to incorporate the terms in the agreement into the memorandum and articles pursuant to cl 14.1, it was argued, the court should apply the maxim equity treats it as done which ought to be done to assume that the parties had in fact made the required amendments. In the event, he submitted that the removal of the petitioner C together with another director nominated by him was in violation of cl 7 of the shareholders' agreement which for all intent and purpose ought to be treated as if it was an article of the company.

Even assuming that the shareholders' agreement could be relied upon, the submission is untenable.

D Firstly, more than five years had elapsed since the parties signed the shareholders' agreement on 11 October 1991. Under cl 22.1 the agreement had automatically come to end and could not now be relied upon. It was submitted however, that notwithstanding its expiry, the court should nevertheless treat it as still subsisting by reason that it had been in the contemplation the parties when they signed the agreement that the rights E and obligations were a continuing process so long as they remain partners in the company. This intention, it was submitted, could be discovered from cl 24.4 of the agreement wherein the parties had in fact obligated themselves to give 'full effect' to the objective they had set themselves to achieve, that is to say to set up a hospital with the expertise of the second respondent, Pantai Hospital Bhd.

F But a close scrutiny of cl 24.4 evinces no such intention. On the contrary, read in conjunction with the operative cl 22.1, it is clear that the parties had intended only to be bound for an initial period of five years. How else could one account for the necessity to incorporate the termination of cl 22.1.

G Secondly, even assuming that the shareholders' agreement could be found to be still in force, or in the alternative written into the articles as suggested, counsel's interpretation of cl 7 of the shareholders' agreement is incorrect. Nowhere was it provided in cl 7 that a director once appointed under the agreement cannot be removed. A constructive reading of cl 7.3(iii) clearly indicates that the subsection merely gives the power to the H person who nominates a director to likewise remove a director he had nominated (including himself) or his alternate director. Neither cl 7 of the agreement nor any other clause provides for any mechanism for the removal of the company's directors other than himself or his nominee. To remove a director other than himself or the director he nominates, recourse must be made to art 72(h) and art 69 of the articles.

I Article 69 read as follows:

> The company may by Ordinary Resolution remove any Director before the expiration of his period of notice, and may by an Ordinary Resolution appoint another person in his stead.

Article 72(h) read as follows: A

> The office of director shall become vacant if he is directly or indirectly interested in any contract or proposed contract with the company and fails to declare the nature of his interest in the manner required by the Act.

The company was amply justified, in my view, to remove the petitioner and his nominee as director. The disclosure of interest was crucial in this case because the company itself had its own pharmacy and medical laboratory within the premises of the hospital. The existence of any other pharmacy or medical laboratory in the hospital would therefore bring them into competition with the hospital's own pharmacy which was in operation in the hospital. In fact the petitioner was obliged under cl 9.3(h) of the shareholders' agreement itself to seek the approval of the other directors which he had failed to do. Further such a declaration is mandatory under s 131(1) of the Companies Act 1965 which also made it an offence for failure to declare. Section 131(1) read as follows: B C D

> Disclosure of interests in contracts, property, offices, etc
>
> (1) Subject to this section every director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall as soon as practicable after the relevant facts have come to his knowledge declare the nature of his interest at a meeting of the directors of the company.
>
> Penalty : Imprisonment for seven years or one hundred and fifty thousand ringgit or both. E

Further, the provision of art 72(h) was imperative. It spelled out in no uncertain terms that the office of director shall become vacant if he is directly or indirectly interested in any contract and fails to declare his interest as required under the Act, which in effect put an automatic end to his directorship, without any need for any resolution to be passed. F

It was also submitted in the alternative that the interest of the petitioner in the two companies had been known to the company all along when the hospital began operation and that since the company had chosen not to act on it earlier it was therefore estopped to raise it later as a ground to remove the petitioner and his nominee. I could find no such evidence that the company had any knowledge of the petitioner's interest. In any case I fail to see how an estoppel could operate in the light of the strict requirement of s 131 of the Act which requires that the interest be declared 'at a meeting of the directors of the company'. G

The mainstay of the petitioner's argument for a relief under s 181 of the Act however lies in the proposition that the petitioner should not be removed by resorting to the powers provided under the articles in any case. The Company, it was argued was in fact set up in the nature of a partnership. The petitioner was a founder member of the company with the main object of setting out the hospital. The hospital came into existence as a result of a detailed feasibility study carried out by the petitioner which he later submitted to the other founding shareholders. They had agreed to work together with him. These facts were clearly set out in the preamble to H I

A the shareholders' agreement. It was in the contemplation of the parties that as a founding member, the petitioner should continue to be represented on the Board of Directors at all times. The spirit and aspiration of the petitioner and the other shareholder was evinced in cl 24 which read as follows:

B

> Each of the parties hereto will execute and do and take such steps as for the time being lie within his power to procure that the company and all those persons or companies referred to in this agreement shall do, perform and comply with all such act and things contemplated under this agreement so that full effect may be given to this agreement.

C Under this clause, it was argued the parties had submitted and subjected themselves to give 'full effect' to the agreement which could only be interpreted to mean that the crucial provisions that were in place in that agreement including the appointment of directors must still be followed by the parties even though the agreement had expired.

D By removing the petitioner from the management of the company, it was argued that the partnership had in fact come to an end. It was therefore just and equitable that the company should be wound up. In the alternative it was suggested that the other shareholders could be made to buy out the petitioner's share at market value as provided under s 181(2)(c) and (d) of the Act.

E Counsel relied on the principle in the House of Lords case of *Ebrahimi v Westbourne Galleries Ltd & Ors* [1972] 2 All ER 492 at p 499, where the following passage from the judgment of Smith J in *Re Wondoflex Textiles Pty Ltd* [1951] VLR 458 at p 467 was cited and approved.

F

> It is also true, I think, that, generally speaking, a petition for winding up, based upon the partnership analogy, cannot succeed if what is complained of is merely a valid exercise of powers conferred in terms by the articles ... To hold otherwise would enable a member to be relieved from the consequences of a bargain knowingly entered into by him ... But this I think, is subject to an important qualification. Acts which, in law, are a valid exercise of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they

G

> became members of the company; and in such cases the fact that what has been done is not in excess of power will not necessarily be an answer to a claim for winding up. Indeed, it may be said that one purpose of [the just and equitable provision] is to enable the court to relieve a party from his bargain in such cases.

H The *Ebrahimi* case was considered by the Court of Appeal in *Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd* where, inter alia, it was ruled (at pp 686E to 687A) that the just and equitable principle enunciated in *Ebrahimi* was equally applicable to an application under s 181 of our Companies Act 1965, although it was concerned solely with a petition to wind up a company under the just and equitable principle under s 222(f) of

I the English Companies Act 1948.

In essence the *Ebrahimi* principle allows a court to subject the exercise of a legal right to equitable considerations which may arise between one individual and another which might make it unjust or

inequitable for that individual to insist on his strict legal right — to the extent that the act of father and son in that case, to remove a third person from the board of directors was held to be unjust and the company was liable to be wound up under the just and equitable principle even though they had in fact acted legally under the articles of the company. The rationale of the case is to be found in the following passage of Lord Wilberforce at p 500 of the report:

> ...The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is , of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.
>
> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence — this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company — so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

There is some truth in counsel's submission that the company was in fact set up in the nature of a partnership and that the petitioner in particular had a legitimate expectation to be involved in the management of the company at least for some period of time. But the *Ebrahimi* principle cannot be applied here. In the *Ebrahimi* case the reason for removal of the director was merely to gain control of the management of the company, by relying on the power in the articles enabling a director to be removed by the sheer force of votes. In the instant case the removal was a mandatory consequence of a material non-disclosure of the director's interest in contravention of art 72(h) of the company's articles which read:

> The office of Director shall become vacant if the Director —
>
> (h) is directly or indirectly interested in any contract or proposed contract with the company and fails to declare the nature of his interest in the manner required by the Act.

The provision left the company with no other option but to treat the petitioner's office of director as vacant as the words 'shall be vacant' clearly shows.

Further, the duty to disclose was a requirement of law under s 131 of the Companies Act 1965 the non-compliance of which read with s 369 may

subject the petitioner to a criminal penalty of an imprisonment not exceeding seven years or a fine not exceeding RM150,000 or to both. Much as the other directors may have a different motive to remove the petitioner, they were not expected to condone an offence of a fellow director or to compromise their position in any way. Equity follows the law — it does not go against it. It follows therefore the argument that the removal of the petitioner had destroyed the partnership which renders it just and equitable that the company be wound up is untenable.

Conclusion

Having examined the complaints advanced by the petitioner in this petition and heard the submissions of the respective counsel, I am unable to find in the instances mentioned therein, that the affairs of the first respondent company was being conducted, or that the powers of the directors were being used in a manner oppressive to the petitioner or in disregard of the interest of the petitioner, that would require the remedy under s 181 of the Companies Act 1965. I am therefore constrained to dismiss this petition with costs.

Petition dismissed.

Reported by Jafisah Jaafar